

**United States Department of Justice  
Office of the United States Attorney  
District of Maryland**

July 21, 2006

The Honorable William Connelly  
United States Magistrate Judge  
6500 Cherrywood Lane  
Greenbelt, MD 20770

Re: Settlement Conference, August 4, 2005  
*Pamela Peterson v. United States*  
Civil Action 03:cv1459

Dear Judge Connelly:

The Defendant, the United States of America, submits the following in response to your July 1, 2006, letter regarding the settlement conference scheduled for August 3, 2006, at 4 p.m.

*Facts.*

Plaintiff Pamela Peterson presented to the U.S. Army medical clinic at Fort Meade, Maryland, on January 15, 2003, with a knee injury that she reportedly sustained playing basketball. U.S. Army Lieutenant Colonel Farrington Pearl, III, M.D., a board certified orthopedic surgeon, treated the Plaintiff and diagnosed a tear of the meniscus in Plaintiff's right knee.

Dr. Pearl recommended arthroscopic surgery to repair the torn meniscus. He also advised Plaintiff and her mother that, instead of surgery, they could take a "wait and see" approach with the probable outcome that the Plaintiff would have chronic knee pain and would be limited in her physical activities for life. After a lengthy discussion concerning the risks of surgery, and the prognosis for recovery, Plaintiff and her mother elected to have the surgical repair.

The arthroscopic surgery was duly scheduled and performed by Dr. Pearl on January 18, 2004, at Walter Reed Army Medical Center, Washington, D.C. Neither Dr. Pearl nor anyone on the surgical team noted any complications, and, indeed, Dr. Pearl's surgical notes describe the procedure as "routine" and "uneventful."

While in the recovery room after the surgery, Plaintiff complained to her mother and the attending nurse, U.S. Army Major Lemaire Farris, R.N., of pain in her right leg. All of the medical professionals, including Plaintiff's expert witnesses, will testify that

pain is a common complaint when anesthesia wears off during the post-operative period. Plaintiff's complaints of pain in her right leg were therefore not unexpected nor were they a reason for alarm. Nurse Farris appropriately administered additional pain medication to the Plaintiff.

Although Nurse Farris does not have a specific recollection of treating the Plaintiff, he will testify that he always performs a physical examination on his patients post-operatively, especially if they have any complaints of pain. He does not recall, nor do his post-operative notes include, any unusual findings. Nurse Farris will testify that if there were any unusual symptoms or findings on physical examination of the patient, they most certainly would have been noted in the medical records.

Approximately four hours after the surgery, and after Nurse Farris' recovery room shift ended, one of the nurses caring for the Plaintiff was unable to detect a pedal pulse in Plaintiff's right foot. Dr. Pearl was promptly notified and he determined that the Plaintiff was suffering from compartment syndrome in her right leg. A fasciotomy of the Plaintiff's right calf was performed to relieve the compartment syndrome. Vascular studies revealed a right femoral artery defect which was successfully repaired by Army surgeons.

Unfortunately, Plaintiff suffered a nerve injury in her right leg, which causes a right foot drop. Otherwise, Plaintiff made a full recovery and she enjoys an active lifestyle.

Plaintiff theorizes that the Plaintiff's femoral artery was mistakenly severed by Dr. Pearl during the arthroscopic surgery. However, Plaintiff's evidence of this crucial fact is circumstantial and highly speculative. Because the severed artery was detected shortly after the surgery, Plaintiff's expert witness, Dr. Cardea, *assumes* that Dr. Pearl accidentally cut it during the surgery. Dr. Cardea also *assumes* that Dr. Pearl was negligent in failing to detect the severed artery prior to closure since, according to Dr. Cardea, Dr. Pearl should have seen blood from the severed artery in the surgical field.

Dr. Pearl has performed over 1,000 arthroscopic knee surgeries without incident. He will testify that he is certain that he did not inadvertently cut Plaintiff's femoral artery. Dr. Pearl will further testify that throughout Plaintiff's procedure, he had direct visualization of the cutting instruments and there was no blood in the operative field prior to closure.

Dr. Bo Kagan, a board certified orthopedic surgeon from Johns-Hopkins Medical Center, will testify that the Plaintiff's injury may have occurred without any surgical mistake. Dr. Kagan will testify that the Plaintiff may suffer from a rare but recognized congenital anomaly, which causes diverse weakness in the vascular tissue. These weakened vessels may rupture spontaneously, or with only a minor traumatic disturbance, such as would be anticipated with arthroscopic surgery. Because Plaintiff's father died at age 38 from a ruptured aneurysm, it is quite likely that the Plaintiff does, indeed, have congenital defects in her arterial walls.

Plaintiff also theorizes that the Army breached the standard of care in failing to detect the Plaintiff's femoral artery defect until four hours after the arthroscopic surgery. Again, Plaintiff's evidence is circumstantial and highly speculative. Plaintiff assumes the arterial defect could have and should have been detected earlier, because, as noted above, Plaintiff erroneously assumes that the artery was severed during the arthroscopic surgery. Defendants' witnesses will testify that the Plaintiff was closely monitored post-operatively and the first sign of the arterial damage could not have been appreciated, absent vascular studies which were not indicated, any sooner than it was.

The evidence will show that the Plaintiff suffered an arterial rupture post-operatively. That rupture could not have been foreseen or prevented. Fortunately, the rupture was timely diagnosed and treated, minimizing Plaintiff's long term damages.

*The Major Weaknesses in Each Side's Case.*

*Plaintiff.* As noted above, Plaintiff's expert witness on the standard of care and causation bases his opinion on assumptions which are not supported by the testimony of the treating physician, Dr. Pearl.

Additionally, while Plaintiff has suffered a permanent nerve injury, she has made a remarkable recovery and the slight foot drop has not impeded her from enjoying an active lifestyle. While Plaintiff can no longer play basketball, she is able to walk with only a slight limp and she continues to enjoy sports such as bicycling, swimming and yoga. Additionally, she is an excellent student and is in line to receive a full academic scholarship for college in the fall. The government has provided all of the Plaintiff's medical care, at no cost to the Plaintiff. Plaintiff has no anticipated future medical expenses associated with her injury and she has no lingering pain. Additionally, she has no wage loss claim. Accordingly, her damages are minimal.

*Defendant.* There are some weaknesses in the Defendant's case as to the issue of causation. Although Dr. Pearl emphatically denies severing the Plaintiff's femoral artery, his operative notes do not expressly state that he visualized the femoral artery and determined that it was not in the surgical field before he excised the meniscus tear. Additionally, the operative notes do not affirmatively indicate that the field was clean before Dr. Pearl terminated the surgery. Dr. Pearl explains that he does not routinely include such matters in his operative notes, however, this will no doubt be an issue for impeachment.

Additionally, the congenital defect that may have predisposed the Plaintiff for the femoral artery injury is very rare and cannot be conclusively diagnosed. Defendant's expert witness, Dr. Kagan, concedes that the Plaintiff's injury may have been caused by a surgical accident. Finally, Nurse Farris' memory and post-operative notes are sparse, which supports the Plaintiff's claim that the government failed to timely diagnose Plaintiff's compartment syndrome.

*Evaluation of the Maximum and Minimum Damage Awards Likely.*

Assuming the Plaintiff can carry her burden of proof as to liability, the Defendant estimates a damage award in the range of \$50,000 to \$350,000.

*Settlement Negotiations.*

Plaintiff made a demand for \$2.5 million which was rejected by the Defendant. Defendant has not counter-offered in that the Defendant disputes liability.

*Attorney's Fees and Cost of Litigation.*

Pursuant to the Federal Tort Claims Act, Plaintiff's attorney's fees are capped at 25% of the total damages award. The Defendant has no out-of-pocket attorney fee expenses as representation is provided by the United States Department of Justice.

The Defendant has approximately \$10,000 in pre-trial discovery costs, including expert witness fees and witness travel expenses, and anticipates another \$10,000 in costs through trial.

*Client Representative at Settlement Conference.*

Major John Bergen, United States Army, will attend the settlement conference as the Defendant's client representative. The undersigned and MAJ Bergen will have complete authority to enter into a binding settlement agreement within the range of authority of the United States Attorney for the District of Maryland.

Respectfully submitted,

Chuck R. Wilkins  
United States Attorney

By John P. Moran  
Assistant United States Attorney